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Reply to:  
Consumer Advocate and Protection Division  
Post Office Box 20207  
Nashville, TN 37202

February 21, 2002

Mr. David Waddell  
Executive Secretary  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, Tennessee 37243

**RE: In re: Show Cause Proceeding Against Talk.com d/b/a Talk America, Inc.  
Docket No. 01-00216**

Dear Mr. Waddell:

Enclosed is an original and thirteen copies of our Final Reply Brief Opposing the Necessity of Talk.com's Request to Take Depositions of Complaining Witnesses in the above-referenced matter. We request that this be filed in this docket with the Tennessee Regulatory Authority. We have served copies on all parties of record. If you have any questions, kindly contact me at (615) 532-3382. Thank you.

Sincerely,

A handwritten signature in cursive script, reading "Shilina B. Chatterjee".

Shilina B. Chatterjee  
Assistant Attorney General

Enclosures

**IN THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

<b>IN RE:</b>	)	<b>DOCKET NO. 01-00216</b>
	)	
<b>SHOW CAUSE PROCEEDING</b>	)	
<b>AGAINST TALK.COM</b>	)	
<b>d/b/a TALK AMERICA, INC.</b>	)	
	)	
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**FINAL REPLY BRIEF OPPOSING THE NECESSITY OF TALK.COM'S REQUEST TO  
TAKE DEPOSITIONS OF COMPLAINING WITNESSES**

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**INTRODUCTION**

Comes Paul G. Summers, the Attorney General & Reporter, through the Consumer Advocate and Protection Division of the Office of Attorney General of the State of Tennessee (hereinafter "Attorney General") hereby responds to briefs filed by the Consumer Services Division of the Tennessee Regulatory Authority ("CSD") and Respondent, Talk.com, Inc

On November 8, 2001, the Tennessee Regulatory Authority ("TRA") issued a Show Cause Order ("Order") to Talk.com. The CSD asserted a total of 149 counts against Talk.com for violations of Tennessee Code Annotated § 65-4-125(a) ("slamming"), § 65-4-125(b) ("cramming") and § 65-4-401 *et seq* ("Do Not Call" violations). Thereafter, Talk.com filed a Brief in Support of Request to Take Depositions of Complaining Witnesses in this matter on January 14, 2002. Thereafter, CSD responded on January 15, 2002 in their Brief in Opposition to Deposing the Consumers Included in the Show Cause Order. In addition, on January 16, 2002, the CSD filed a Response of the Consumer Services Division to Talk.com's Brief in Support of Request to Take

Depositions of Complaining Witnesses. On February 1, 2002, the TRA issued an Order granting the Petition to Intervene that was filed by the Attorney General of the State of Tennessee. Thereafter, the Consumer Advocate & Protection Division of the Office of the Attorney General filed their Brief in Opposition to Talk.com's Request to Take Depositions of Complaining Witnesses on February 6, 2002. At the status conference held on February 7, 2002, the procedural schedule of January 3, 2002 was supplemented and the Pre-Hearing Officer directed that Final Reply Briefs on the Necessity of Depositions were due on February 21, 2002. Pursuant to the directive of the Pre-Hearing Officer, the Attorney General hereby submits this brief.

### **ARGUMENT**

The Tennessee Rules of Civil Procedure governs the scope of discovery in this proceeding before the Tennessee Regulatory Authority. Tennessee Regulatory Authority Rule 1220-2.11 states that discovery matters in contested cases that come before the agency be "effectuated in accordance with the Tennessee Rules of Civil Procedure." TRA Rule 1220-2.11

Rule 26.02(1) of the Tennessee Rules of Civil Procedure states that parties are permitted to obtain any information during discovery that is relevant and not privileged. TENN. R. CIV. P. 26.02(1). Nevertheless, the scope of proper discovery is not unlimited. Rule 26.02(1) states that there are limitations on the discovery of information that is unreasonably cumulative or duplicative, obtainable from another source, or unduly burdensome. Further, under the traditional practices and procedures of the TRA, discovery is not granted without a party demonstrating a need for discovery. Respondent Talk.com has not tried to communicate with the subject consumers. Respondent Talk.com's request to obtain information through oral depositions of 56 consumers is unreasonably cumulative, duplicative, obtainable from another source and unduly burdensome.

**I. CONSUMERS WILL BE HARMED IF THEY ARE FORCED TO SUBMIT TO ORAL DEPOSITIONS**

Allowing oral testimony of 89 consumers would result in tremendous harm to consumers and should not be allowed. Consumers should not be subjected to being forced to submit oral testimony in order to substantiate the complaints that they filed with the TRA. Rule 26 further allows a court to enter an order to protect a party or non-party “from annoyance, embarrassment, oppression, or undue burden or expense.” TENN. R. CIV. P. 26.03. The TRA should not allow Respondent Talk.com to depose complaining witnesses in this matter because they should not be subjected to such a tedious process nor the substantial expense of legal representation and potentially having to take leave from employment. The TRA should enter an order to protect the complaining witnesses from being forced to give oral testimony in this matter.

**II. DEPOSITIONS ARE NOT NECESSARY IN ORDER TO DETERMINE THE FACTS AND ADDRESS FACTUAL DEFENSES BY RESPONDENT TALK.COM**

It is clear from the filings by Respondent Talk.com that it has made no effort to contact the subject consumers. Until Respondent Talk.com makes such an attempt, it has not established the threshold need for taking these depositions justifying consideration of its request.

Respondent Talk.com stated that they will need to take oral depositions of consumers that filed complaints because they need to adduce the circumstances of the alleged calls and to address factual defenses set forth in Tennessee Code Annotated § 65-4-401 *et seq.*

It would be wholly unnecessary for Respondent Talk.com to take depositions of complaining witnesses that have alleged “Do Not Call” violations since the information they are seeking is available to them in their internal telephone solicitation records. Furthermore, Respondent Talk.com has copies of all consumer complaints that were submitted to the TRA alleging the facts

concerning “Do Not Call” violations, slamming and cramming. The facts concerning each of the “Do Not Call” violations are stated by each consumer in their complaint. Most importantly, it is very unlikely that 89 consumers have misrepresented the facts of their complaints concerning “Do Not Call” violations, slamming and cramming.

It is unnecessary and frivolous to request to take oral depositions of 56 complaining witnesses that filed complaints concerning “Do Not Call” violations so that Respondent Talk.com can address factual defenses. Respondent Talk.com can easily provide a defense without the necessity of a deposition by cross-referencing their own phone records with the complaints for the date of the violation and prove that they did not call the consumer that complained concerning the “Do Not Call” violation.

The TRA should not allow depositions of consumers because it would cause an undue burden. Factors that courts may consider whether there is undue burden are “relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents described and the burden imposed. The facts and circumstances concerning violations alleged by consumers are available to Respondent Talk.com in the complaints that were submitted by the complaining witnesses to the TRA.

### **III. CONDUCTING A MULTITUDE OF DEPOSITIONS IS UNNECESSARY AND OUTSIDE THE SCOPE OF THE DISCOVERY PROCESS IN THIS PROCEEDING**

A request to take oral depositions from 89 complaining witnesses is overly broad. Respondent Talk.com has indicated that they will need to take the depositions of 33 complaining witnesses that filed slamming and cramming complaints and take the depositions of all of the 56 complaining witnesses that filed complaints for violations of the telephone solicitation statute.

Overly broad discovery requests are burdensome and oppressive. *U.S. v. Reed*, 726 F.2d 570, 577 (9<sup>th</sup> Cir. 1984). It is burdensome and oppressive for Respondent Talk.com to request to take the depositions of 89 consumers.

There should be limits on the number of depositions that are permitted. Discovery, like all matters of procedure, has ultimate and necessary boundaries. *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S. Ct. 385, 392 (1947). The TRA should establish a firm limit on the number of depositions that can be taken in this proceeding.


The TRA has the authority to limit the number of depositions in this proceeding. Tennessee Code Annotated § 4-5-311(c) provides that “[t]he agency may promulgate rules to further prevent abuse and oppression in discovery.”

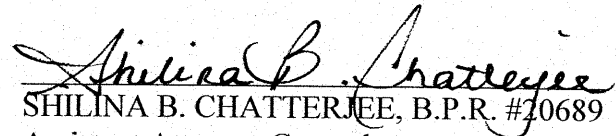
### CONCLUSION

For the foregoing reasons, the Attorney General of the State of Tennessee submits that depositions of the complaining witnesses should not be allowed in this proceeding.

Respectfully submitted,

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DATED: February 21, 2002

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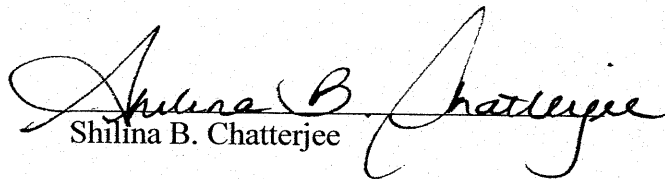
## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via facsimile or hand delivery on February 21, 2002.

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